



New Type 13 Regulated Activity to Take Effect 2 October 2024

On 24 March 2023, the Securities and Futures Commission (**SFC**) published its [consultation conclusions](#) on its proposed legislative and code amendments to introduce its new Type 13 regulated activity to regulate depositaries, meaning the top-level trustees and custodians, of SFC-authorized collective investment schemes (**Relevant CISs**). Relevant CISs will include unit trusts, mutual fund companies, real estate investment trusts and pooled retirement funds authorised under section 104 of the Securities and Futures Ordinance (the **SFO**) and open-ended fund companies registered and authorised under the SFO. The [original consultation paper](#) was issued in 2019 and the [consultation conclusions and a further consultation](#) were issued in February 2022.

During the most recent consultation period, the SFC received five written submissions from various stakeholders. The SFC noted that the respondents generally supported the proposals and the majority of comments related to the clarification of technical issues.

The New Type 13 Licensing Regime

Defining the new Type 13 Regulated Activity

Under the SFC's proposals, the new Type 13 Regulated Activity (HK-SFC RA 13) will be defined as the activity of providing depositary services for a Relevant CIS, which means:

- a) providing custody and safekeeping of Relevant CIS property. In the case of a CIS in the form of a trust, Relevant CIS property refers to property held on or subject to the trust according to a trust deed that constitutes or governs the Relevant CIS. For a real estate investment trust, the Relevant CIS Property means: (i) property held on or subject to the trust according to a trust deed that constitutes or governs the Relevant CIS; and (ii) any property owned, controlled or held by any special purpose vehicle owned or controlled under the Relevant CIS under the Code on Real Estate Investment Trusts; and
- b) providing oversight of the Relevant CIS to ensure that it is operated in accordance with the provisions of its constitutive documents. Constitutive documents refer to the documents governing the formation of or constituting the Relevant CIS, and documents that impose obligations relating to the custody and safekeeping of Relevant CIS Property or oversight of the operations of the Relevant CIS.

A person providing the services in a) and b) for a Relevant CIS:

- in the form of a trust, will mean the person appointed as a trustee according to the trust deed that constitutes or governs the Relevant CIS; or
- in a form other than a trust, will mean the person appointed as the custodian according to a

written agreement entered into by the person with or in respect of the Relevant CIS.

A depositary's delegates (e.g. its sub-custodians) will be outside the scope of HK-SFC RA 13.

Depositaries of pure MPF products will not need to be licensed or registered for HK-SFC RA 13 because the definition of a Relevant CIS will exclude:

- a registered scheme or its constituent fund as defined under the Mandatory Provident Fund Schemes Ordinance (**MPF Ordinance**); and
- an approved pooled investment fund (**APIF**) as defined under the Mandatory Provident Fund Schemes (General) Regulation, which is offered only to: professional investors; employers as defined under the MPF Ordinance; registered schemes or their constituent funds as defined under the MPF Ordinance; occupational retirement schemes and pooling arrangements as defined under the Occupational Retirement Schemes Ordinance; and other approved pooled investment funds.

The SFC has noted that pooled retirement funds and approved pooled investment funds, which are offered to both MPF schemes and directly to retail investors, are not excluded from the definition of Relevant CIS. Their trustees will therefore need to be licensed or registered for HK-SFC RA 13.

The definition of a HK-SFC RA 13 will be set out in an amendment to Schedule 5 of the SFO. The consequence of the definition is that:

- trustees acting only for pure MPF products will not need to be licensed or registered for HK-SFC RA 13 since they are already regulated and supervised by the Mandatory Provident Fund Schemes Authority (the **MPFA**); and
- trustees acting for both pure MPF products and Relevant CISs will be subject to the supervision of both the MPFA (in respect of the MPF products) and the SFC (in respect of the Relevant CISs).

Licensing Requirements for HK-SFC RA 13 Individuals

Under the proposed legislation, the individual staff members of a company carrying on HK-SFC RA 13 activity who are responsible for the custody and safekeeping of scheme property will need to be licensed or registered for HK-SFC RA 13.

Where the custody and safekeeping function is delegated by the depositary to another entity (e.g. a sub-custodian), the staff of the depositary responsible for monitoring the performance of the delegate will need to be licensed or registered for HK-SFC RA 13.

Where the custody and safekeeping function is carried out wholly or partly within the depositary, the following staff will need to be licensed or registered for HK-SFC RA 13:

- staff who are empowered to approve instructions or transactions for custody-related purposes in respect of a Relevant CIS; and
- staff who assume oversight duties over the performance of this function.

However, staff members that are engaged in custody operations but have no powers of approval or oversight duties will not need to be licensed or registered. The SFC defines oversight duties as the monitoring of various operations of the CIS, including monitoring compliance with investment and borrowing restrictions, cash flow, fund accounting and valuation, and the issue, repurchase, redemption and cancellation of the units or shares of the CIS.

However, where the depositary acts as a fund administrator, transfer agent or registrar of a Relevant CIS, the staff members engaged solely to provide these services without any oversight responsibilities will not need to be licensed or registered for HK-SFC RA 13. Similarly, there is no requirement for individuals who only perform marketing activities for a depositary to be licensed or registered.

For individuals seeking to be licensed or registered under HK-SFC RA 13, relevant industry experience, meaning hands-on working experience whether in Hong Kong or overseas, will be necessary. The SFC has noted that it will provide a grandfathering arrangement for practitioners when implementing the HK-SFC RA 13 scheme. Individuals may also seek an exemption from the recognised industry qualification and the local regulatory framework paper requirements if they meet the exemption criteria set out in paragraph 4.4 of the SFC's Guidelines on Competence. Financial Resources Requirement

A corporation licensed for HK-SFC RA 13 will be required to have a minimum paid up share capital of HK\$10 million and a minimum liquid capital of HK\$3 million.

Professional Indemnity Insurance Requirement

A depositary will be required to maintain professional indemnity insurance coverage commensurate with its business, to be maintained at group or entity level.

Conduct and Internal Control Requirements

HK-SFC RA 13 licensed or registered depositaries and individuals will need to comply with the relevant SFC codes and guidelines, including:

- the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (**Code of Conduct**);
- the Management, Supervision, and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission (**Internal Control Guidelines**); and
- the **Product Codes** which include the Code on Unit Trusts and Mutual Funds (**UT Code**), the Code on Real Estate Investment Trusts (**REIT Code**), the Code on Pooled Retirement Funds (PRF Code) and the Code on Open-Ended Fund Companies (**OFC Code**).

Anti-money Laundering (AML) and Counter-terrorist Financing (CTF) Obligations

The SFC generally expects that an HK-SFC RA 13 licensed or registered depositary will carry out customer due diligence on the CIS (whether it is in trust, corporate or other form) to which the depositary services are provided. Nonetheless, the SFC will issue FAQs to provide further guidance once the HK-SFC RA 13 regime comes into effect.

Amendments and additions to the existing relevant SFC codes and guidelines

Schedule 11 of the Code of Conduct

The SFC's new Schedule 11 to the Code of Conduct includes requirements applicable to depositaries licensed or registered for HK-SFC RA 13 in relation to:

- communication with and oversight of the management company of a Relevant CIS;
- the appointment and oversight of delegates or third parties, including an assessment of their competence, ongoing monitoring and addressing actual or potential conflicts of interests;
- record keeping;
- oversight of the subscription and redemption process;
- the monitoring of valuation, prices and net asset value calculation, distribution payments, cash flows and investment;
- the custody and safekeeping of Relevant CIS property;
- ensuring there are proper controls in relation to connected party transactions entered into by or on behalf of the Relevant CIS; and
- handling different classes of investors fairly.

The rationale for incorporating these requirements into Schedule 11 was to include the guidance on the internal controls trustees and custodians should have in place which is set out in Appendix G to the UT Code. Further, the SFC noted that under Schedule 11 "it will be the responsibility of the senior management of an [HK-SFC RA 13] depositary to exercise professional judgement in designing suitable internal control systems and ensuring that they are adequately, effectively and properly implemented".¹

The Product Codes

Under the proposed amendments to the Product Codes, the UT Code's requirement to submit an annual internal control report to the SFC will be removed. Section 4.2(d) of the UT Code will also be revised so that a trustee or custodian of a Relevant CIS must be either an HK-SFC RA 13 depositary or an overseas bank or entity which is

prudentially regulated and supervised in its home market by an authority acceptable to the SFC. The REIT Code and the PRF Code will also be amended to reflect the introduction of HK-SFC RA 13. The SFC will ensure that the OFC code on the eligibility requirements for custodians of publicly offered OFCs will be aligned with those under the aforementioned revisions to the UT Code. However, the requirements for custodians of privately-offered OFCs will be the subject of a separate consultation exercise.

Subsidiary Legislation

The SFC also proposed to amend the subsidiary legislation to bring the existing rules in line with the new HK-SFC RA 13 regime. The significant proposed amendments and additions are as follows:

- **The Securities and Futures (Client Securities) Rules (CSR) : i)²** the addition of a new part 2A (Sections 9A-C) and 10A on “Scheme Securities Received or Held by Intermediaries in Conduct of Type 13 Regulated Activity and their Associated Entities” in relation to the requirements for the deposit or registration of scheme securities, dealing with scheme securities, and the limitations on the treatment of scheme securities; and ii) the definition of Scheme Securities in Section 2.
- **The Securities and Futures (Client Money) Rules (CMR)³** : the addition of Part 3 on “Scheme Money Received or Held by Licensed Corporations in Conduct of Type 13 Regulated Activity and their Associated Entities” on the payment of scheme money into and out of segregated accounts and Relevant CIS accounts, the treatment of interest on scheme money held in segregated accounts and Relevant CIS accounts, and the requirements relating to written instructions and the receipt of cheques for scheme money.
- **The Securities and Futures (Keeping of Records) Rules (KRR) : i)⁴** the addition of Sections 3A and 4A on the record keeping requirements for intermediaries licensed or registered for Type 13 regulated activity and their associated entities; and ii) Schedule 2 detailing the records to be kept by intermediaries licensed or registered for Type 13 regulated activity under the new section 3A.
- **The Securities and Futures (Financial Resources) Rules (FRR) : i)⁵** the addition of Section 37A which requires any amount of scheme money and the subscription and redemption proceeds received or held by a corporation licensed for HK-SFC RA13 that has not been paid into a segregated account to be treated as its ranking liabilities; and ii) updates to Schedule 1 to set out the paid-up share capital and required liquid capital requirements for HK-SFC RA13.
- **The Securities and Futures (Insurance) Rules⁶** : amendments to Part 2 of Schedule 2 to specify an insured amount of “nil” for HK-SFC RA13 depositaries.
- **The Securities and Futures (Accounts and Audit Rules)⁷** : amendments to sections 4 and 5 to account for the new sections in the CSR, CMR and KRR relevant to HK-SFC RA13 depositaries.
- **The Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules⁸** : amendments to Section 3 to reflect the changes stated in the Product Codes section.
- **The OTCD Reporting Rules⁹** : amendments to reflect that an HK-SFC RA 13 depositary, which is a counterparty to an OTC derivative transaction, in its capacity as a trustee of a Relevant CIS, will be exempted from the reporting obligation. However, they will be subject to the OTCD Reporting Rules’ record keeping obligations.

Implementation and Transitional Arrangements

Potential HK-SFC RA 13 depositaries and their related staff members will have 18 months, commencing the date of gazettal of the amendment to Schedule 5 of the SFO (the Gazettal Date), to complete the licensing or registration process. They will also have four months, starting from the Gazettal Date, to submit their licence or registration applications. Furthermore, individuals employed by a depositary to provide depositary services at the time their applications relating to HK-SFC RA 13 are submitted during the transitional period will be exempted from the requirement to pass the local regulatory framework paper provided they complete no less than 5 hours of training on the legal and regulatory framework for HK-SFC RA 13 within 12 months of securing a licence or registration approval. This training must be provided by a continuous professional training provider.

Subject to completion of the legislative process, the RA 13 regime is expected to take effect on 2 October 2024, when the transitional period will come to an end.

[1] The SFC Consultation Paper on the Proposed Regulatory Regime for Depositaries of SFC-authorized Collective Investment Schemes (2019), paragraph 36

[2] The Consultation Conclusions on Proposed Amendments to Subsidiary Legislation and SFC Codes and Guidelines to Implement the Regulatory Regime for Depositaries of SFC-authorized Collective Investment Schemes (2023), at Section 1 of Annex B

[3] Ibid. at Section 2 of Annex B

[4] Ibid. at Section 3 of Annex B

[5] Ibid. at Section 4 of Annex B

[6] Ibid

[7] Ibid

[8] Ibid

[9] The Consultation Conclusions 2023, Annex B, Section 5

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